IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS INSOLVENCY JURISDICTION

NOTICE OF MOTION NO.25 OF 2005

IN

NOTICE NO.N/393 OF 2004

Re: Ajay Surendra Tanna & anr...Judgment Debtors.

Ex-parte:

SICOM Limited ..Petitioning Creditor.

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Mr.P.V.Shah for the Petitioning Creditor.

Ms.K.A.Shah i/b Mr.A.G.Shah for judgment debtors.

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CORAM : DR.D.Y.CHANDRACHUD, J.

15th March, 2005.

P.C. :

1. The Insolvency Notice is based on a decree dated 18th June, 2003 passed by this Court in Summary Suit 285 of 2001. The amount which is due and payable as on 7th December, 2004 is Rs.4,59,54,965.50 together with future interest at the rate of 22% per annum. The Motion has been moved before the Court by the guarantors. The loan

was advanced to a company by the name of Suprapti Plastics Limited. The Applicants to the Motion were directors and guarantors. Two submissions have been urged in support of the Motion: (i) that the proceedings cannot be pursued any further since a reference has been made to the BIFR on 3rd March, 2004 and that the provisions of Section 22 of the Sick Industrial Companies (Special provisions) Act, 1985 must apply and (ii) neither of the two Applicants reside in Mumbai within the jurisdiction of this Court and consequently under Section 11(b) of the Presidency Towns Insolvency Act, 1909, this Court would have no jurisdiction.

2. In so far as the first submission is concerned, the relevant dates are thus :

The decree was passed on 18th June, 2003. The reference to the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 was made on 3rd March, 2004. The Insolvency Notice was issued on 24th December, 2004. Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 inter alia covers - (i) a suit for the recovery of money; (ii) a suit for the enforcement

of any security against the industrial company; (iii) a suit for the enforcement of any guarantee in respect of any loans or advances granted to the industrial company. Such suit shall not lie or be proceeded further except with the consent of the BIFR or as the case may be the AAIFR. In the present case, the prohibition contained in Section 22 of the Act would not be attracted for the simple reason that the suit has been decreed on 18th June, 2003 much prior to the reference and there is no question, therefore, of the suit being instituted or being proceeded with further.

3. In Dewal Singhal v. State of Maharashtra (2001 Vol.106 Company Cases 587), a Division Bench of this Court held that as far as proceedings against a guarantor of a loan to an industrial company are concerned, the bar under Section 22 is restricted only to a suit and does not apply to any other proceeding. The only proceeding against the guarantor of a loan to an industrial company which is barred under Section 22 is a suit and nothing else. The Division Bench held that an insolvency notice is not a suit and therefore, the said proceeding was not barred. In a subsequent

decision in Kailash Nath Agarwal v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd (2003(2) SCALE 160), the Supreme Court held that there was no reason for widening the scope of the word 'suit' in Section 22 so as to cover proceedings against the guarantor of an industrial company. The Court held that the object of the SICA and for introducing the 1994 amendment was to facilitate the rehabilitation or the winding up of sick industrial companies and it is not the stated object of the Act to protect any other object or body. The Court held that if a creditor enforces a guarantee in respect of a loan granted to the industrial company, the provisions of the Act would not be rendered nugatory and all that could happen would be that the guarantor would step into the shoes of the creditor vis-a-vis the company to the extent of the liability met. Explaining the earlier judgment of the Supreme Court, in Patheja Bros. Forgings & Stampings v. ICICI Ltd. (2000(6) SCC 545), the Court held that the observations therein could not be read to hold that protection of the guarantors of loans to a sick company is an object of the 1994 amendment which must colour the interpretation of the amendment.

Till 1994 no protection was afforded to the guarantors under the Act at all. A limited protection has been given in 1994. Hence, the Supreme Court held that the expression used being clear and unambiguous, it was not for the Court to question the legislature and/or to give a wider protection than it did. The judgment of the Division Bench and of the Supreme Court provide a clear answer to the first submission.

4. In so far as the question of jurisdiction is concerned, the Presidency Towns Insolvency Act, 1909 contemplates in Section 9(5) the grounds on which the person who is served with an insolvency notice, may apply for setting aside of the notice. Clause (a) of sub section (5) is that the debtor has a counter claim or set off against the creditor which is equal to or is in excess of the amount due under the decree or order and which he could not, under any law for the time being in force, prefer in the suit or proceeding. Clause (b) deals with a situation where the debtor is entitled to have a decree or order set aside under any law providing for the relief of indebtedness. Clause (c) provides a situation where the decree or order is

not executable under the provisions of any law referred to in clause (b) on the date of the application. The objection to jurisdiction, will undoubtedly be considered by the Court, but not at the present stage. The appropriate stage for considering such an objection is when the insolvency petition is instituted and comes up for hearing. Section 9(5) provides statutory grounds for setting aside the Insolvency Notice and it would not be open the Court to enlarge upon those grounds beyond what has been specifically provided by the legislature. Besides, even if the question of jurisdiction was to be considered at this stage, the affidavit of service shows that the Insolvency Notice was received on behalf of the Applicants within the original jurisdiction of this Court. The loan was advanced by SICOM at Mumbai and a Division Bench of this Court has held in Harshad Ratilal Shah v. Ishardas Sudarshanlal (1986 Mh.L.J. 325) that for the purposes of Section 11(b), a business which was carried on by a debtor within the limits of the ordinary original civil jurisdiction of the Court will be deemed to be continued to be carried out until all the trade and business liabilities have been discharged. The

Division Bench held that the Insolvent must be deemed to have been carrying on business so long as the debts remain unpaid. However, in so far as the question of jurisdiction is concerned, the observations in the present order should not be regarded as the expression of any final opinion particularly since I have come to the conclusion that the Court in an application under Section 9(5) would not be justified in entertaining such an objection at this stage. In the circumstances, the Motion is dismissed.